STATE OF FLORIDA

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

JOSEPH E. ZAGAME
Petitioner,

Case no. 12-1356
FDACS File No. ~~A77658~~ A77568

vs.

DEPARTMENT OF
AGRICULTURE AND
CONSUMER SERVICES
Respondent,

and

SOUTHWEST FLORIDA WATER
MANAGEMENT DISTRICT,
Intervenor.
_____/

FINAL ORDER

THIS CAUSE arising under section 373.407, Florida Statutes,[1] came before the Commissioner of the Florida Department of Agriculture and Consumer Services (FDACS) for consideration and final agency action. The Commissioner of Agriculture and Consumer Services, as head of FDACS, has jurisdiction over the subject matter and the parties.

I. STATEMENT OF THE ISSUE

Whether Petitioner's dredging and filling on his property in Center Hill, Florida, qualifies for an agricultural exemption under section 373.406(2), Florida Statutes, from the requirement to obtain an environmental resource permit from the Southwest Florida Water Management District. The Recommended Final Order rendered February 1, 2013 by Administrative Law Judge James H. Peterson III (hereinafter "ALJ") of the Division of Administrative Hearings

[1] Unless otherwise noted, citations to statutes and rules are to their current, 2012, versions.

(DOAH) found that the dredging of a 1.12-acre cattle watering pond, in a wetland, and the deposition of the resulting fill on the remaining 1.3-acres of wetland, was exempt from permitting. That Recommended Order is now before the Commissioner of Agriculture and Consumer Services for final agency action.

II. PRELIMINARY STATEMENT

The Preliminary Statement in the Recommended Order states as follows[2]:

> On February 10, 2012, Respondent, FDACS, issued a Notice of Binding Determination (Preliminary Determination) to Intervenor, Southwest Florida Water Management District (SWFWMD), and Petitioner, Joseph E. Zagame, Sr. (Petitioner). The Preliminary Determination found that Petitioner was not entitled to an agricultural exemption under section 373.406(2), from environmental resource permit requirements for dredging and filling activities within wetlands on property controlled by Petitioner located at 7376 County Road 710, Sumter County, Florida (the Property). Thereafter, Petitioner timely filed a request for an administrative hearing which was referred to the Division of Administrative Hearings.
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> On the first day of the final hearing held August 8, 2012, the order of presentation was altered for clarity of issues so that FDACS and SWFWMD presented witnesses and exhibits first, followed by Petitioner. That first day, FDACS presented the testimony of FDACS environmental specialist, Noel Marton, and FDACS environmental administrator, William Bartnick, and introduced two exhibits that were received into evidence as Exhibits FDACS-1 and FDACS-2.
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> On that first day, SWFWMD presented the testimony of Jeff Whealton, a regional environmental scientist with SWFWMD, and introduced one exhibit which was received into evidence as Exhibit I-1. That first day, Petitioner presented the testimony of James Walts of Center Hill, Florida; Mr. Kenneth Barrett, a professional engineer; and Mr. James Modica III, an environmental consultant, and introduced four exhibits which were received into evidence as Exhibits P-1, P-2, P-3, and P-4.

[2] The Preliminary Statement was excerpted directly from the Recommended Order; however, the acronyms have been modified for consistency.

At the end of the first day, Mr. Modica's testimony was interrupted because the hearing facility had to be closed for the day. Thereafter, an Order allowing additional discovery was issued on August 14, 2012, and, by separate Order, a second day of hearing was scheduled for October 15, 2012.

At the second day of hearing, Petitioner called Mr. Modica and Mr. Bartnick to testify. Petitioner, Mr. Joseph E. Zagame, Sr., also testified on his own behalf, and introduced 16 more exhibits which were received into evidence as Exhibits P-1A, P-3A, P-4A, P-5A, P-6A, P-7A, P-8A, P-9A, P-10A, P-11A, P-2B, P-1C, P-2C, P-3C, P-4C, and P-5C.

The final hearing was recorded and a transcript ordered. The parties were given 30 days from the filing of the final Transcript to file proposed recommended orders. The Transcript for the first day of hearing was filed on August 21, 2012, and the Transcript for the second day was filed on October 30, 2012. The entire Transcript consists of four volumes-- two volumes from the first day and two from the second day of hearing. The parties timely filed their respective Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

III. - POST-HEARING PROCEDURAL HISTORY

The ALJ entered the Recommended Order on February 1, 2013. On February 18, 2013, FDACS filed Exceptions to the Recommended Order. On February 18, 2013 SWFWMD filed a Motion for Extension of Time to File Exceptions to the Recommended Order. On February 19, 2013, SWFWMD filed Exceptions to the Recommended Order. On February 27, 2013, the Petitioner filed an Objection to the Southwest Florida Water Management District's Motion for Extension of Time to File Exceptions to Recommended Order. On March 19, 2013, FDACS rendered its "Order Granting Extension of Time" to SWFWMD to file the Exceptions to the Recommended Order.

The record consists of all notices, pleadings, motions, intermediate rulings, evidence admitted and matters officially recognized, the transcript of the proceedings, proposed findings and exceptions, stipulations of the parties and the Recommended Order.

IV. - STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, dictates the applicable standard regarding Findings of Fact. FDACS is therefore bound to accept the ALJ's Findings of Fact unless, after a thorough review of the record, there exists no competent substantial evidence to support the finding. Id. Charlotte Cnty. v. IMC Phosphates Co., 18 So. 3d 1089 (Fla. 2d DCA 2009); Brogan v. Carter, 671 So. 2d 822 (Fla. 1st DCA 1996). Additionally, FDACS cannot modify or substitute new Findings of Fact if competent substantial evidence supports the ALJ's findings. Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006); Gross v. Dep't of Health, 819 So. 2d 997 (Fla. 5th DCA 2002). The Florida Supreme Court described "competent substantial evidence" as follows:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as a conclusion. Becker v. Merrill, 155 Fla. 379, 20 So. 2d 912 [Fla. 1943] . . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.' Schwartz, American Administrative Law, p.88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p.481; United States Casualty Co. v. Maryland Casualty Co., Fla. 1951, 55 So. 2d 741; Consolidated Edison. Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 [1938].

DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) (citation omitted), followed by, Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856 (Fla. 4th DCA 1997). "Competent substantial evidence" does not refer to the weight or probative value of the evidence but solely to the existence and admissibility of that evidence. Scholastic Book Fairs. Inc. v. Unemployment

Appeals Comm'n, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996); Dunn v. State, 454 So. 2d 641, 649 (Fla. 5th DCA 1984).

Findings of Fact that are actually Conclusions of Law should be treated as Conclusions of Law despite any mislabeling. Battaglia Props. Ltd. v. Fla. Land and Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1994); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987). Unlike Findings of Fact, Conclusions of Law may be modified or rejected by FDACS and differing interpretation applied. Barfield v. Dep't of Health, 805 So. 2d 1008, 1011 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089 (Fla. 2d DCA 2009); Fla. Pub. Emps. Council 79, AFSCME v. Daniels, 646 So. 2d 813, 815 (Fla. 1st DCA 1994).

V. EXCEPTIONS TO THE RECOMMENDED ORDER

FDACS filed eight exceptions to the Recommended Order. SWFWMD filed five exceptions to the Recommended Order. The Petitioner did not file exceptions to the Recommended Order. Where the exceptions relate to the same Findings of Fact or Conclusions of Law, they will be considered together.

VI. EXCEPTIONS TO FINDINGS OF FACT

FDACS Exception 1. – Exception to Findings of Fact 9 and 10.
SWFWMD Exception 1. Exception to Finding of Fact 9.

> *9. In March 2007, Petitioner began cleaning up the Site. He noticed a stench from the garbage as the area was cleaned. During cleanup, 26 old tires, 14-cubic yards of old appliances, and pieces of concrete and steel were removed from the Site.*

SWFWMD's exception relates to the following sentence, "He noticed a stench from the garbage as the area was cleaned." The term "stench" (nor any reference to smell or odor) does

not appear anywhere in the hearing transcript and was not taken into evidence. FDACS's exception to Finding of Fact 9 is directed to the facts that the garbage removed from the property impacted only a very small percentage of the wetland and that the wetland was viable and functioning. Therefore, "[h]e noticed a stench from the garbage as the area was being cleaned" will be rejected as a Finding of Fact, but the remainder of Finding of Fact 9 is accepted inasmuch as testimony exists in the record from Petitioner detailing the items removed from the site.

> *10. While there were no accurate wetland surveys of the Site prior to the initiation of Petitioner's clean-up efforts, historical photographs of the Site and remnant plants indicate that, at the time Petitioner undertook the cleanup, the wetland had been significantly impacted. The construction of roads SR 469 and CR 710, which occurred prior to 1973, severed and excluded the Site from the larger wetland area, preventing the free flow of water beyond the Site. Although remaining a wetland, the severance adversely impacted the wetland even before the dumping.*

FDACS's exception objects to the ALJ's characterization that the wetland had been "significantly impacted." FDACS's exception also questions the extent of the impact of the debris located in the wetland. However, the Preliminary Determination stated that "the impacted remnant wetland was of questionable quality . . . having been previously severed and excluded from the larger wetland system, by the construction of SR 469 and CR 710." (Exhibit FDACS-2) The Preliminary Determination also referenced a letter from the City of Center Hill indicating that the site in question was the subject of a cleanup consisting in part of the removal of debris and eliminating "a public health hazard that existed as a common dumping-ground for many years." (Petitioner's Exhibit P-4)

Despite the stipulation by all parties that the site had been a wetland prior to Petitioner's activities, the ALJ's Finding of Fact 10 is accepted. The relevance of the condition of the

wetland is questionable in that section 373.406(2), Florida Statutes, is silent as to the *quality* of wetlands. Accordingly, the Finding of Fact will be given appropriate weight.

FDACS Exception 2. – Exception to Finding of Fact 18.

> *18. On January 4, 2011, Petitioner submitted an after-the-fact application to the District for an environmental resource permit for the pond, along with an approximately $1,500 permit application fee. After conducting a site meeting to review the impact of Petitioner's activities, District staff made a request for additional information. The request for additional information (RAI) requested an amount of engineering that, according to Petitioner, would make compliance cost prohibitive. As Petitioner explained in his testimony:*
>
> > *My quick estimate, and what the engineering, required all of that, surveys[,] to[p]ographic surveys, could have been anywhere from 50 to [$]75,000, maybe more.*
>
> *While the actual costs to comply with the Districts RAI have not been determined, Petitioner's testimony that the RAI requirements were cost prohibitive is credited.*

FDACS's exception addresses the irrelevancy of this Finding of Fact in that section 373.406(2), Florida Statutes makes no mention at all regarding cost of remediation being a factor in whether one is entitled to an exemption in the first place. The Finding of Fact is accepted solely because Petitioner's testimony noted above is in the record, and will be given appropriate weight in light of its irrelevance.

SWFWMD Exception 2. Exception to Finding of Fact 21.

> *21. The approximately 1.12-acre open water area resulting from Petitioner's dredging and filling ranges from 4 to 6 feet deep at the center, depending on the groundwater level. At the time of the District's site visit, the central pond depth was approximately four feet. December is the dry season in this area of Florida and in 2011 there was a drought. [FDACS]'s survey of the Site shows a water depth of six feet.*

The SWFWMD exception is related to the entities responsible for measuring the depth of the pond. The SWFWMD exception is well taken. Therefore, Finding of Fact 21 will be modified in keeping with the record as follows:

> 21. The approximately 1.12-acre open water area resulting from Petitioner's dredging and filling ranges from 4 to 6 feet deep at the center, depending on the groundwater level. At the time of the ~~District's~~ FDACS's site visit, the central pond depth was approximately four feet. December is the dry season in this area of Florida and in 2011 there was a drought. ~~[FDACS]'s~~ Petitioner's survey of the Site shows a water depth of six feet.

FDACS Exception 3. – Exception to Finding of Fact 32.
SWFWMD Exception 3. Exception to Finding of Fact 32.

> *32. At the final hearing, however, the evidence indicated that Petitioner's activities were normal and customary for cattle operations in the area.*

FDACS and SWFWMD assert exceptions to this finding on the basis that Finding of Fact 32 is actually a mislabeled Conclusion of Law. Mislabeling a Conclusion of Law as a Finding of Fact will not transform the Conclusion of Law into a Finding of Fact. Battaglia, 629 So. 2d 161, 168 (Fla. 5th DCA 1994); Kinney, 501 So. 2d 129 (Fla. 5th DCA 1987). If the issue is infused with policy considerations, then the finding is really a Conclusion of Law. Fla. Power Corp. v. Dep't of Env'tl Regulation, 662 So. 2d 545 (Fla. 1st DCA 1994). In the context of this Final Order, FDACS is free to accept, reject, or modify erroneous Conclusions of Law. Barfield, 805 So. 2d 1008 (Fla. 1st DCA 2001); IMC Phosphates, 18 So. 3d 1089 (Fla. 2d DCA 2009); Fla. Pub. Emps. Council, 646 So. 2d 813 (Fla. 1st DCA 1994).

The question is whether the ALJ's Finding of Fact 32 should properly be considered a Conclusion of Law.

> [T]he courts have generally held that the issue of whether an individual violated a statute by breaching the applicable standard of care is a factual issue that is susceptible to ordinary methods of proof *and is an issue that is not infused with policy considerations*. . . . Florida courts have consistently held that the issue of whether an individual violated a statute or deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on the evidence and testimony. . . . Hence an agency may reject or alter the administrative law judge's ultimate Finding of Fact regarding this issue only if it was not supported by competent, substantial evidence.

Gross v. Dep't of Health, 819 So. 2d 997, 1003 (Fla. 5th DCA 2002) (emphasis added) (footnote omitted).

The exceptions filed by SWFWMD and FDACS do not dispute that excavation of a cattle pond to benefit a cattle operation is a normal and customary agricultural practice in the area. In this instance, the exceptions filed by SWFWMD and FDACS instead dispute the ALJ's Finding of Fact that the excavation of a cattle pond *in a wetland* to benefit a cattle operation is a normal and customary agricultural practice in the area. The issue is whether the excavation of a cattle watering pond in a wetland is infused with policy considerations, making this purported Finding of Fact a mislabeled Conclusion of Law. The First District Court of Appeal opined on this subject in Fla. Power Corp. v. State Dept. of Envtl. Reg., 638 So. 2d 545 (Fla. 1st DCA 1994). In that case, the Secretary of the Department of Environmental Regulation correctly overruled a Finding of Fact regarding whether certain impacts were *de minimis* and whether mitigation offered by Florida Power was inadequate. Id. at 561. The dispute involved the value attributed to herbaceous versus forested wetlands and the public interest in overall wetland preservation. Id.

The public interest of wetland protection identified in the Florida Power case is applicable in this case. Evaluating whether the exemption provided by section 373.406(2), Florida Statutes applies in individual cases requires a review of the scope and scale of the activities balanced with the public's interest in wetland preservation on a case by case basis. FDACS's exception contends that the determination of whether other cattle ponds excavated in wetlands in the area of the subject site were normal and customary, or illegal, is infused with public policy considerations.

The ALJ received evidence regarding the existence of other cattle ponds in the area that had been excavated in wetlands. Specifically, the Petitioner introduced testimony from James Modica, III. Mr. Modica testified in an expert capacity and repeatedly indicated that ponds were excavated within wetlands by cattlemen as a customary practice. TR 8-8, p. 212, 213, 214, 215; TR 10-15, p. 56[3]. During the hearing, FDACS counsel mounted a vigorous cross-examination and later introduced significant countervailing testimony on this issue. The evidence accepted by the ALJ is not convincing to FDACS and SWFWMD based on the exceptions filed by these parties. However, the amount of weight given to Mr. Modica's testimony is solely within the province of the ALJ. FDACS's exception strenuously states that the ALJ's conclusion is misplaced. However, that is not the standard. As previously noted in this Final Order, FDACS is not permitted to simply re-weigh the evidence and insert a differing Finding of Fact. Whether other cattle ponds excavated from wetlands exist in the area is susceptible to "ordinary methods of proof" and FDACS is bound to accept this portion of Finding of Fact 32 in this Final Order. Gross, 819 So. 2d at 1003.

[3] The hearing before the ALJ was bifurcated. References to the August 8, 2012 hearing are: TR 8-8, p.# and references to the October 15, 2012 hearing are TR 10-15, p.#.

However, the ALJ's Finding of Fact 32 is overly broad and actually involves a mixed question of fact and law. The *existence* of cattle watering ponds excavated in wetlands is subject to normal modes of proof and is accepted as a Finding of Fact. The *size and scope* of the excavation, including the placement of resulting fill on approximately one-half of the wetland, requires the application of policy and law. Therefore, the scope of the Petitioner's activities (size of the pond, extent of excavation, and placement of the fill) amounts to a Conclusion of Law and will be discussed further in that context.

The ALJ's Finding of Fact is accepted with regard to the excavation of a cattle watering pond within a wetland. The size and scope of the pond excavation and fill placement amount to a Conclusion of Law and will be subsequently discussed.

FDACS Exception 4. – Exception to Finding of Fact 34 and footnote 6.

> *34. Man-made, belowground cattle-watering ponds are very typical in Florida, especially in south and southwest Florida because of the high water tables in the southern part of the peninsula.*
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> *Footnote 6/ This finding is extracted from the testimony of [FDACS]'s Environmental Administrator William Bartnick, who added, "but the [cattle ponds] I've seen are almost always constructed in uplands and our manual says 50 feet away from the well and edge [of wetlands]." See Transcript from August 8, 2012, p. 132. While Mr. Bartnick's testimony reflected in the finding is credited, his observations regarding the locations of ponds were contradicted by more persuasive evidence indicating that cattle ponds are commonly located in low-lying areas.*

FDACS's exception to this Finding of Fact is limited to the argument regarding the limited amount of evidence on the matter. FDACS's exception notes that this Finding of Fact should not be misunderstood to equate low lying areas and wetlands. The Finding of Fact is supported by competent substantial evidence, TR 10-15, p. 56 and is therefore accepted. The clarification urged by the FDACS's exception is well taken. The findings and conclusions

reached in this Final Order will not confuse the difference between low-lying areas and wetlands. It is duly noted that not all low-lying areas are wetlands and these terms are not congruent.

FDACS Exception 5. – Exception to Finding of Fact 35.

> *35. Further, "[i]t is not uncommon practice for Florida cattle ranchers to excavate cattle ponds, remove muck from existing cattle ponds, and/or grade side slopes of ponds in low lying depressional areas to provide a safe and reliable water source for their cattle."*

FDACS's exception contends that this Finding of Fact was taken out of context from a binding determination issued in a different case. The reasoning in this exception is that this quotation, taken out of context, cannot provide competent substantial evidence that excavation of a cattle pond in a wetland is normal and customary. The Finding of Fact was introduced into evidence as a part of Exhibit P-1A without objection, and therefore, Finding of Fact 35 is accepted with a limitation on meaning as suggested by FDACS's exception, i.e., that not all low-lying areas are wetlands.

FDACS Exception 6. – Exception to Finding of Fact 36 and footnote 8.
SWFWMD Exception 4. Exception to Finding of Fact 36.

> *36. The fact that it is common for cattle ponds to be built in low-lying areas was further demonstrated by aerial photographs presented by Petitioner's witness, Mr. Modica, of areas near the Property, including an approximately six-acre pond off Palm Avenue (the Sanchez property), a pond at a site labeled Emory Lane, and a pond off CR 48. While the ponds are considered by the District to be out of compliance on the grounds that they may have adversely affected wetlands, their existence shows that dredging and filling in low areas for cattle ponds is common practice in the area.8/*
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> *Footnote 8/ Mr. Modica also testified that he had four ponds that had been dug in wetlands on his own property in the area and that there were a number of ponds dug in wetlands on the Disney Wilderness Preserve (previously, the Walker Ranch property) that the Nature Conservancy which manages the property had matured into stable systems that they*

decided not to restore. While details as to the date of construction of these ponds was not provided, Mr. Modica's testimony provided additional support for the proposition that dredging of cattle ponds in wetlands has been a common practice for the area in the past.

FDACS's exception states that the advent of expanded wetland regulation modified what may have previously been the normal and customary practice of cattle ranchers to excavate cattle watering ponds within wetlands. The ALJ rejected this notion and relied on the testimony of the Petitioner's expert, concluding that the excavation of cattle ponds in wetlands are a normal and customary practice. Additionally, testimony from Mr. Bill Bartnick of the FDACS, Office of Agricultural Water Policy indicated that a small pond excavated from a wetland could possibly be exempt from regulation pursuant to section 373.406(2), Florida Statutes. TR 8-8, p. 114. Through their exceptions, FDACS and SWFWMD vigorously argue that the enactment of state and federal wetlands laws "changed the practice of digging in wetlands as the state required permits for such activities and the denial of federal subsidies greatly restricted the incentives to do so." Respondent FDACS Exceptions to Recommended Order page 15 (citing Tr. 10-15, p. 177). There is no dispute that wetland laws have in recent memory worked in the public interest to protect wetlands from encroachment and destruction. The FDACS and SWFWMD exceptions assert that adverse impacts to wetlands have been illegal for some time and the wholesale destruction of a 2.5-acre wetland (the result of Petitioner's activities) cannot be normal and customary. The exceptions filed by FDACS and SWFWMD highlight evidence that should have led the ALJ to a different conclusion. However, the standard is whether the conclusion reached by the ALJ is supported by any competent substantial evidence. Due to the existence of competent and substantial evidence, as previously noted, Finding of Fact 36 and Footnote 8 are accepted in this Final Order to the extent that cattle ponds were found to be excavated in wetlands via the testimony of Mr. Modica.

The ALJ was also careful to indicate that excavation of cattle watering ponds had been a "common practice" in the area and in the past. This Finding of Fact does not amount to a finding on the ultimate issue of whether these activities were "normal and customary" pursuant to section 373.406(2), Florida Statutes. The issue of "normal and customary" in this case amounts to mixed question of law and fact due to the scope and extent of Petitioner's activities. The question of whether historic dredging and filling (without the benefit of a permit and illegal) are normal and customary amount to questions of law and policy and will be further discussed in this Final Order. The scope and extent of the excavation and fill will be discussed in the proper context as a Conclusion of Law.

FDACS Exception 7. – Exception to Finding of Fact 37.
SWFWMD Exception 5. Exception to Finding of Fact 37.

> *37. Although the pond is larger than needed because the footprint of the dumping area was large, and Petitioner may have some non-agricultural plans for the Site in the future, under the facts and evidence as outlined herein, it is found that the pond constructed by Petitioner was for purposes consistent with common practices for cattle operations in the area.* (emphasis added)

Finding of Fact 37 is accepted in part and rejected in part. Through this Final Order FDACS accepts portions of Finding of Fact 37, specifically: "the pond is larger than needed," "Petitioner may have some non-agricultural plans for the Site in the future," and "the footprint of the dumping area was large." The above underlined remainder of this Finding of Fact is rejected and will be considered a Conclusion of Law. A finding regarding the purpose of the pond, particularly regarding the size necessary to support a cattle operation and the removal of wastes in the dumping footprint, is not a Finding of Fact but a Conclusion of Law. Specifically, the phrase "sole or predominate purpose," included in section 373.406(2), Florida Statutes, requires an objective -- not subjective -- review and application of the facts to the law. A. Duda and Sons,

Inc. v. St. Johns River Water Mgmt. Dist., 17 So. 3d 738 (Fla. 5th DCA 2009). Even if Finding of Fact 37 is not a mislabeled Conclusion of Law, the record contains no competent substantial evidence to support the ALJ's finding regarding the size of the pond. The Petitioner's own testimony was that no consideration was given regarding the size of the pond as it related to the requirements of his cattle herd. TR 10-15, p.195. Indeed, the Petitioner's own expert indicated that it is uncommon for ranchers to excavate oversized ponds. TR 10-15, p.89, 106. This portion of Finding of Fact 37 will be evaluated in the following section as a Conclusion of Law.

To the extent that Finding of Fact 37 relates to the fill placed on the site, the record is clear that approximately fourteen cubic yards of debris and 26 tires were removed from the site. TR 8-8 p.58. The exception filed by FDACS describes at length the coverage this amount of debris would have on the 2.5-acre site. TR 8-8, p.36. No dispute exists that cleaning up a dump or dumping area is a normal and customary activity. The dispute is whether the *extent* of Petitioner's cleanup activities and *amount* of fill placed in the wetland (associated with that cleanup) are normal and customary. The issue of normal and customary as it relates to the extent of the fill placed in the 2.5-acre wetland is a mixed question of law and fact. Analyzing the extent of the fill requires the application of the facts to the relevant wetland protection laws including, but not limited to, chapter 403, Florida Statutes. The *extent* of Petitioner's cleanup and fill is therefore a Conclusion of Law and will be discussed in the following section. Even if the debris was scattered evenly over the 2.5-acre site, an assumption apparently made by the ALJ, scraping off the entire face of the wetland cannot be considered normal and customary as a Conclusion of Law and will be discussed in subsequent sections of this Final Order.

As previously discussed, the ALJ's determination of purpose is a Conclusion of Law and is rejected as part of a Finding of Fact. The resulting phrase, as modified below, is accepted as Finding of Fact 37.

> 37. ~~Although~~ [T]he pond is larger than needed because the footprint of the dumping area was large, and Petitioner may have some non-agricultural plans for the Site in the future~~, under the facts and evidence as outlined herein, it is found that the pond constructed by Petitioner was for purposes consistent with common practices for cattle operations in the area~~.

FDACS Exception 8. – Exception to Finding of Fact 41.

> *41. Considering those factors addressed in the above-quoted drafts of [FDACS]'s drafts of the Preliminary Determination, as well as the evidence of the condition of the wetland when Petitioner began his cleanup operations, it is found that the predominant purpose and effect of Petitioner's activities was to construct a cattle pond and clean up a dumping ground, not to adversely impact a wetland.*

Finding of Fact 41 is mislabeled and is actually a Conclusion of Law. The terms "predominate" and "purpose" have specific statutory meanings. § 373.406(2), Fla. Stat. These two concepts were explained by the Court in Duda.17 So. 3d 738 (Fla. 5th DCA 2009). As previously noted, the subjective intent of a party is not the issue. It is the objective effect of the actions that is determinative. Id. The determination requires a review of the facts in light of the applicable law and is therefore clearly a Conclusion of Law. Finding of Fact 41 is accordingly rejected and will be evaluated as a Conclusion of Law in the following section.

VII. EXCEPTIONS TO CONCLUSIONS OF LAW

FDACS Exception 1. – Exception to Conclusion of Law 56.
SWFWMD Exception 3. – Exception to Conclusion of Law 56, 59, and 64.

> *56. As noted in the Findings of Fact, above, as a matter of fact, it has been found that Petitioner's activities were normal and customary and were not for the sole or predominant purpose of adversely impacting wetlands. The factual findings are consistent with applicable law.*

The Findings of Fact include a finding that Petitioner's excavation of a cattle pond in a wetland and removal of garbage and debris are normal and customary activities in the area. As previously indicated, limited to the context of this Final Order, FDACS accepts that a normal and customary practice includes the excavation of cattle watering ponds even if located within a wetland under certain limited circumstances. However, the *extent* of the excavation and filling of the wetland involves broad policy considerations and the application of wetlands law and is therefore a Conclusion of Law. Fla. Power Corp. v. Dept. of Envtl. Reg., 638 So. 2d 545, 559 (Fla. 1st DCA 1994). As part of this Final Order FDACS also accepts as a Finding of Fact that removal of debris is a normal and customary practice even if those activities occur within a wetland. However, the *extent* of the fill and destruction attributable to debris removal involves broad policy considerations and the application of wetland protection laws and clearly amounts to a Conclusion of Law. Id. A finding that *all* of Petitioner's activities were normal and customary ignores the interpretation given by FDACS's witnesses without a showing that the FDACS's witnesses' interpretations were clearly erroneous. Therefore, to the extent the above Conclusion of Law approves the size and breadth of Petitioner's dredging and filling, it is rejected. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So. 2d 1330 (Fla. 1st DCA 1995).

FDACS's interpretation of section 373.406(2), Florida Statutes relies on the best management practices established for agricultural activity. Section 403.927(4), Florida Statutes defines agricultural activity and references the "implementation of best management practices adopted by the Department of Agriculture and Consumer Services or practice standards adopted by the United States Department of Agriculture Natural Resources Conservation Service."

The FDACS's exceptions correctly referenced the Florida Supreme Court's opinion regarding the deference given to state agencies when analyzing statutes protecting the public interest:

> The legislature enacted chapter 403[4] to protect the air and waters of Florida from pollution and degradation. section 403.021, Fla. Stat. (1983). The provisions of statutes enacted in the public interest should be given a liberal construction in favor of the public. *State v. Hamilton*, 388 So. 2d 561 (Fla. 1980). DER liberally construed section 403.817 when it adopted the administrative rules implementing that statute. Courts should accord great deference to administrative interpretations of statutes which the administrative agency is required to enforce. *Pan American World Airways, Inc. v. Florida Public Service Commission*, 427 So. 2d 716, 719 (Fla. 1983).

Dept. Environmental Regulation v. Goldring, 477 So. 2d 532, 534 (Fla. 1985).

The approximately 2.5-acre site was previously a wetland. The size of the pond (1.12-acres) and the extent of the fill (1.3-acres) require the application of the facts to the relevant law and policy. This determination is appropriately considered a Conclusion of Law. The record provides ample evidence regarding the appropriate size of a cattle watering pond. Noel Marton provided expert testimony on behalf of and as an employee of FDACS. Mr. Marton's undisputed testimony was that SWFWMD allocates approximately twelve gallons per head per day for cattle

[4] The relevant provisions of chapter 403 in the Goldring case are now in chapter 373, Florida Statutes. *See*, chapter 93-213, Laws of Fla., (shifting the dredge and fill portions of chapter 403, Florida Statutes, to chapter 373, Florida Statutes).

watering requirements. TR 8-8, p.46. Mr. Marton also indicated that the Best Management Practices adopted by FDACS allow up to thirty gallons per head per day. TR 8-8, p.47. Based on these fundamental water requirements, Mr. Marton testified that the typical cattle watering pond necessary to support 100 head of cattle is about a tenth of an acre in size. TR 8-8, p.48. Mr. Marton also testified as to the number of cattle reported by the Petitioner to occupy the site at a maximum of 65 head. TR 8-8, p.45. Finally, Mr. Modica, the Petitioner's expert, indicated that it is uncommon for ranchers to excavate oversized ponds. TR 10-15 p.89, 106.

Mr. Marton clearly indicated that the fill associated with this site would not qualify for an exemption as normal and customary. TR 8-8, p.50. The ALJ's Finding of Fact 8 relied on the Petitioner's testimony and concluded that the activities conducted on-site were done without regard to the appropriate size needed to water the cattle and that the footprint of the pond and fill were determined by the perceived footprint of the garbage. TR 10-15, p.195. Generally, it is not normal and customary to place fill on 1.3-acres of wetland during the elimination of scattered garbage.

The First District Court of Appeal noted the following in Florida Power Corp. v. State Dept. of Envtl. Reg., 638 So. 2d 545 (Fla. 1st DCA 1994):

> The title to chapter 84-79, Laws of Florida, which created the "Warren S. Henderson Wetlands Protection Act of 1984," Part VIII of chapter 403, Florida Statutes, now entitled "Permitting of Activities in Wetlands," reads as follows:
>
> > WHEREAS, Florida's wetlands are a major component of the essential characteristics that make this state an attractive place to live. They perform economic and recreational functions that would be costly to replace should their vital character be lost, and
> >
> > WHEREAS, the economic, urban, and agricultural development of this state has necessitated the alteration, drainage, and development of wetlands. While state policy permitting the uncontrolled development

> of wetlands may have been appropriate in the past, the continued elimination or disturbance of wetlands in an uncontrolled manner will cause extensive damage to the economic and recreational values which Florida's remaining wetlands provide, and
>
> WHEREAS, it is the policy of this state to establish reasonable regulatory programs which provide for the preservation and protection of Florida's remaining wetlands to the greatest extent practicable, consistent with private property rights and the balancing of other vital state interests, and
>
> WHEREAS, it is the policy of this state to consider the extent to which particular disturbances of wetlands are related to uses or projects which must be located within or in close proximity to the wetland and aquatic environment in order to perform their basic functions, and the extent to which particular disturbances of wetland benefit essential economic development, ...

The Fifth District Court of Appeal observed the following during its analysis of Booker Creek Preservation, Inc. v. Southwest Florida Water Mgmt. Dist., 534 So. 2d 419, 424 (Fla. 5th DCA 1988):

> The primary legislative concern in passing section 373.414[5] appears to have been to preserve wildlife and fish in small isolated wetlands because they are unique as to both their ecosystems and species. Many wildlife species inhabiting isolated wetlands are becoming endangered and fall into areas of critical state concern.

The ALJ's Findings of Fact that a portion of the Petitioner's activities are normal and customary both as to the pond excavation and to some extent the debris clean up are accepted. However, whether the scope and extent of Petitioner's activities were normal and customary as a Conclusion of Law requires the application of the previously recited facts to the well-established wetland protection laws. It is clear that the normal and customary size of a cattle watering pond is directly related to the anticipated needs of the cattle herd and correlates to approximately a tenth of an acre pond per 100 head of cattle. The Petitioner's excavation of a pond in excess of

[5] Originally, section 373.414, Florida Statutes, was passed in chapter 86-186, section 4, Laws of Florida to explicitly confer regulatory jurisdiction over isolated wetlands to the water management districts. It was later replaced by broader authority that gave the water management districts and the Department of Environmental Protection co-equal authority over activities in waters of the state. – Footnote included from FDACS exceptions.

ten times what is considered adequate and appropriate is not normal and customary as a Conclusion of Law. Likewise, the Petitioner's activity of excavating and/or filling in that portion of the wetland not directly related to the dumped debris is not normal and customary as a Conclusion of Law. Therefore, the Petitioner's activities were in part normal and customary as a Finding of Fact. On the other hand, a portion of the Petitioner's activities were not normal and customary as a Conclusion of Law.

Petitioner's normal and customary activities must also be analyzed with regard to purpose. The determination of purpose involves the application of facts to applicable law and therefore amounts to a Conclusion of Law, as previously discussed. The objective effect of activities undertaken by the Petitioner (excavation of the pond, filling the wetland, and removal of the debris) cannot be for the "sole or predominant purpose of . . . adversely impacting wetlands," without running afoul of the Fifth District Court of Appeal's decision in Duda. section 373.406(2), Florida Statutes, Duda, 17 So.3d 738 (Fla. 5th DCA 2009). FDACS's exception to this Conclusion of Law rests in great part on the deleterious effect on the wetland by Petitioner's activities. What then is the "sole or predominant purpose" of the Petitioner's activities? Applying the Duda analysis, the effects (purpose) are threefold: excavation of a pond, cleaning up landfill debris, and the utter and complete destruction of the wetland. Additionally, FDACS adopted Fla. Admin. Code R. 5M-15.001(3) while this case was pending and defines "sole or predominant purpose" as "[t]he primary function of the activity in question." The legal conclusion regarding "sole and predominant purpose" is discussed below. The ALJ's Conclusion of Law 56 is accepted in part and rejected in part.

FDACS Exception 2. – Exception to Conclusion of Law 58 and 59.

58. The words "predominant" and "purpose," as used in section 373.406(2), Florida Statutes (2007), prior to the 2011 revisions were construed in Duda and Sons, Inc. v. St. Johns River Water Management District, 17 So. 3d 738 (Fla. 5th DCA 2009). As the context of those terms as used in the current version of section 373.406(2) is the same, the interpretation of those terms in Duda and Sons, Inc., supra (Duda I), is still relevant. There, the Fifth District Court of Appeal agreed with the water management district and administrative law judge's interpretation of the term "purpose" within the context of section 373.406(2) to mean the action's objective effect or function, as opposed to the subjective intent of the landowner in undertaking the action. Duda I, 17 So. 3d at 742. The Fifth District Court of Appeal, however, rejected the water management's definition of the term "predominant" as "more than incidental," and explained:

> *"Predominant" does not mean "more than incidental." There are many gradations between "predominant" and "incidental." An item can be "more than incidental" but not "predominant. For example, if an individual had four equal sources of income totaling $100,000/year, all four sources of income would be "more than incidental." However, none of the four would be a predominant source of income. Similarly, an alteration of topography may have more than an incidental effect of impounding or obstructing surface waters even though that was not the predominant effect.*
>
> *The lack of merit in the District's argument is further demonstrated by the fact that pursuant to section 373.406(6), the District has already exempted from regulation any activity which has "only minimal or insignificant individual or cumulative adverse effects on the water resources of the district" for both agricultural and non-agricultural activities. [footnote omitted] The District's interpretation of section 373.406(2), if accepted, would render the agricultural exemption virtually meaningless. As conceded by the District at oral argument, an alteration of topography that had the effect of only incidentally impounding or obstructing surface waters would, in almost*

> *all cases, already be exempt from regulation pursuant to subsection (6) -- regardless of whether the property owner was engaged in the occupation of agriculture.[10/] * * * In its brief, Duda contends that the primary purpose of its drainage ditches was to lower the level of the groundwater table so as to enhance agricultural productivity. Section 373.406(2) provides an exception to the agricultural exemption for the impounding or obstructing of surface waters -- not ground water. [footnote omitted] Accordingly, if Duda constructed a drainage ditch for a purpose consistent with the practice of agriculture and if the predominant effect of the drainage ditch was to lower the groundwater table level, then the construction of the drainage ditch would be exempt from the District's permitting requirements even if the ditch had a more than incidental effect of impounding or obstructing surface waters.*
>
> *Duda I, 17 So. 3d 743-744. Cf. Fla. Admin. Code R. 5M-15.001(3)(effective 10/14/2012, subsequent to Duda I and one day prior to the last day of the final hearing)("Sole or predominant purpose [means] [t]he primary function of the activity in question").*

Conclusion of Law 58 is essentially a restatement of the law. FDACS's exception to this paragraph lies in the ALJ's application of this restatement of the law to the facts, therefore Conclusion of Law 58 is accepted.

> *59. Similarly, in this case, while there may have been more than an incidental effect on a wetland, the evidence showed that Petitioner's activities were not for the sole or predominant purpose of adversely impacting a wetland, but rather were primarily undertaken to construct a cattle pond and clean up a dumping ground.*

The FDACS's exception to Finding of Fact 59 is directed at the ALJ's application of "predominant" and "purpose." Due consideration is given to the ALJ Finding of Fact as well as FDACS's exception. Weighing the effects of the Petitioner's activities in the context of the Duda case requires the following analysis.

The effects (purpose) of Petitioner's activities are threefold: excavation of a pond, cleaning up landfill debris, and destruction of the wetland. A portion of the first two activities are "consistent with the normal and customary practice of [cattle operations] . . . in the area" and have been accepted in part as Findings of Fact and rejected in part as Conclusions of Law. The remaining question is whether the "sole or predominant purpose" (or "primary function" as defined by Fla. Admin. Code R. 5M-15.001(3)) of the activities found to be normal and customary, as a Finding of Fact, was to adversely impact wetlands.

FDACS issues Binding Determinations upon proper request pursuant to section 373.407, Florida Statutes. The limitations imposed by section 373.406(2), Florida Statutes seem clearly aimed to ensure that the requested exemption is not merely a pretext to adversely impact or eliminate wetlands. After a lengthy hearing, the ALJ concluded that the Petitioner desired to excavate a cattle watering pond and clean up a landfill. Petitioner's subjective desires are not determinative of the issue. The "primary function" of that *portion* of Petitioner's activities, *recognized as normal and customary* as a Finding of Fact and Conclusion of Law, were to accomplish a pond excavation and debris removal, not to adversely impact the wetland. Conclusion of Law 59 is therefore accepted but limited to the *portion* of Petitioner's activities that are normal and customary as a Finding of Fact and Conclusion of Law.

SWFWMD Exception 4. – Exception to Conclusions of Law 56, 60, 63, 68, and 71.

> *60. This conclusion is made with due regard for the elevated legal status and protection that Florida's wetlands have deservedly received under state and federal laws enacted in the 1980's and 90's.*

SWFWMD's exception to Conclusion of Law 60 seems to be based solely on the weight given by the ALJ to historic wetland protection laws. The ALJ's Conclusion of Law 60 is accepted.

FDACS Exception 3. – Exception to Conclusion of Law 63.

> *63. Further, denial of an exemption for Petitioner's activities under the facts and circumstances in this case would not promote wetland protection. Rather, it would require the application of regulations in a manner that would interfere with improvements made to a remnant wetland dumping ground that has been entirely severed from its adjacent wetlands since prior to 1973. Despite vast and important legislation protecting wetlands, an exemption is contemplated for qualifying activities that do not have a predominant purpose of adversely affecting wetlands.*

The clear public purpose of Chapter 373, Florida Statutes is to protect all waters of the state, including wetlands. The Florida Legislature carved out a specific exemption to this general purpose when it enacted section 373.406(2), Florida Statutes. The exemption specifically contemplates adverse impacts to wetlands: "However, such alteration or activity may not be for the sole or predominant purpose of . . . adversely impacting wetlands." Id. The great public importance attributed to wetlands is not in question. Rather, the question is whether the impacts suffered by this particular wetland (complete destruction) were the "sole or predominant purpose" of the Petitioner's activities. Id. The Preliminary Determination does not relate to the wisdom of the Legislature and whether the relevant legislative actions will advance wetland protections or not. The first two sentences of ALJ's Conclusion of Law 63 are rejected, while the third sentence is accepted.

FDACS Exception 4. – Exception to Conclusion of Law 64.
SWFWMD Exception3. – Exception to Conclusion of Law 56, 59, and 64.

> *64. As the evidence demonstrated that the predominant purpose of Petitioner's activities was the construction of a cattle pond along with the clean up, and not to adversely affect wetlands, as long as those activities are for purposes consistent with the normal and customary practice of such occupation in the area, Petitioner should be entitled to the exemption.*

Conclusion of Law 64 is accepted in part and rejected in part. The "predominant purpose of Petitioner's activities" requires a legal conclusion leading to the consideration of "predominant purpose" as a Conclusion of Law, not a Finding of Fact. The ALJ's Findings of Fact that a portion of Petitioner's activities are a "normal and customary practice . . . in the area" were previously accepted. The last phrase -- "[p]etitioner should be entitled to the exemption" -- is accepted in part.

FDACS Exception 5. – Exception to Conclusion of Law 65 through 68.
SWFWMD Exception1. – Exception to Conclusion of Law 65 and 67.

> *65. This Recommended Order undertook analysis of the adverse impact to wetlands first in order to avoid duplicative use of wetland criteria in determining whether Petitioner's activities qualify for the exemption. [FDACS]'s Preliminary Determination, however, uses the fact that Petitioner's activities were in a wetland in both the "adverse impact to wetland" analysis as well as its "normal and customary practice" inquiry.*
>
> *66. In fact, even in its draft of the Preliminary Determination where [FDACS] found that Petitioner's alterations were not undertaken "for the sole or predominant purpose of . . . adversely impacting wetlands," [FDACS] found in its "normal and customary" analysis that "cattle watering ponds are not normally constructed within wetlands."*
>
> *67. The undersigned finds that duplicative use of the fact that wetlands were impacted is contrary to the inquiry contemplated under the 2011 revisions to section 373.406(2), which by their terms, anticipate that a wetland would be involved in an agricultural activity for which an exemption from wetland regulation is requested.*
>
> *68. Even if it were appropriate to consider that the activity occurred in a wetland under the "normal and customary" inquiry, as noted in the Findings of Fact, above, the evidence demonstrated, as a matter of fact, that cattle ponds in low-lying areas are normal and customary for cattle operations in the area.*

FDACS implements the process prescribed by section 373.406(2), Florida Statutes. The manner in which FDACS conducts analysis and implementation is not at issue. An agency's

interpretation of statutory authority can only be altered if that agency's interpretation is clearly erroneous. Abram v. State Dept. of Health Bd. of Med., 13 So. 3d 85 (Fla. 4th DCA 2009); Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So. 2d 1330 (Fla. 1st DCA 1995). Therefore, the ALJ's Conclusions of Law 65, 66, 67, and 68 are rejected.

FDACS Exception 6. – Exception to Conclusions of Law 69 and 70.
SWFWMD Exception2. – Exception to Conclusions of Law 69 and 70.

> *69. [FDACS] further suggests that Petitioner's activities were not normal and customary because they are inconsistent with best management practices adopted by [FDACS]. As part of the revisions made in chapter 2011-165, Laws of Florida, the definition of "agricultural activities" found in section 403.927(4)(a) was also revised, shown with new language underlined and old language stricken, as follows:*
>
> > *"Agricultural activities" includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting cultivating, harvesting, fallowing, leveling, construction of access roads, ~~and~~ placement of bridges and culverts, and implementation of best management practices adopted by [FDACS] of Agriculture and Consumer Services or practice standards adopted by the United States Department of Agriculture's Natural Resources Conservation Service, provided such operations are not for the sole or predominant purpose of impeding ~~do not impede~~ or diverting ~~divert~~ the flow of surface water or adversely impacting wetlands.*
>
> *70. [FDACS] argues that reference to best management practices in section 403.927(4)(a) means that activities that do not meet those standards are not "normal and customary" within the meaning of section 373.406(2). In light of the plain terms of the statute, however, [FDACS]'s argument is unpersuasive. Rather than restricting which practices are "normal and customary," the conjunctive "and" 28 actually expands the list of "agricultural activities" previously set forth in section 403.927(4)(a) to also include best management practices. (Endnotes omitted)*

The ALJ's Conclusions of Law 69 and 70 are accepted in part and rejected in part. Agricultural activities considered "normal and customary [agricultural] practice[s]" include, but are not limited to, recognized best management practices. §373.406(2), Fla. Stat. The ALJ apparently misconstrued FDACS's and SWFMWD's exceptions and legal arguments regarding these particular conclusions. Conclusions of Law 69 and 70 are accepted with regard to the inclusion of best management practices within the overall concept of "normal and customary agricultural practices," while the ALJ's characterization of FDACS's and SWFWMD's argument is rejected.

FDACS Exception 7. – Exception to Conclusion of Law 71.
SWFWMD Exception4. – Exception to Conclusions of Law 56, 60, 63, 68, and 71.

> *71. While not all aspects of Petitioner's pond are typical, the evidence demonstrated that Petitioner's activities resulted in a cattle pond that was useful to his cattle operations and were for "purposes consistent with the normal and customary practice of such occupation in the area" within the meaning of section 373.406(2).*

SWFWMD's exception to this Conclusion of Law was discussed at length in the previous sections and the legal argument succinctly stated by SWFWMD was given due consideration. FDACS's exception asserts that the agricultural activity must be "necessary" to fit within the exemption outlined by section 373.406(2), Florida Statutes. However, the term "necessary" is actually found in section 403.927(4)(a), Florida Statutes. That definition of "agricultural activities" is limited to that particular section. Therefore, Conclusion of Law 71 is accepted.

VIII. FINDINGS OF FACT

The Commissioner adopts the Findings of Fact from the ALJ's Recommended Order except as modified or rejected. The Findings of Fact are as follows:[6]

1. The Property is comprised of 118 acres of contiguous parcels located within Section 23, Township 21 South, Range 23 East, in Sumter County, at the intersection of County Road 469 and County Road 710 in Center Hill, Florida. Title to the Property is held by Petitioner and his wife under various entities that they control.[7]

2. SWFWMD is an administrative agency charged with the responsibility to conserve, protect, manage, and control water resources within its geographic boundaries, and to administer and enforce chapter 373, Florida Statutes, and related rules under chapter 40D of the Florida Administrative Code.

3. FDACS is the state agency authorized under section 373.407, Florida Statutes, to make binding determinations at the request of a water management district or landowner as to whether an existing or proposed activity qualifies for an agricultural-related exemption under section 373.406(2).

4. Petitioner uses the Property for raising cattle, an agricultural use. The activities at the Property are operated under the name "Serenity Ridge Farms." Petitioner has had up to 65 head of cattle on the Property, but since 2011, has kept only approximately 30 head. The Property is classified as agricultural pursuant to section 193.461, Florida Statutes.

[6] The text of the Recommended Order has been modified to make the acronyms of the entities consistent or as otherwise specifically noted.

[7] The Property contains several parcels, some owned by Ramaela of Clermont Limited Partnership (Ramaela) and some owned by Menaleous Land Group LLC (Menaleous). Ramaela's partners are two trusts. Petitioner is trustee of one of Ramaela's partners and is a managing member of Menaleous.

5. At the time Petitioner acquired the Property, there was an approximately 2.5-acre, more or less triangular, wetland at the southern end of the western parcel at the intersection of State Road (SR) 469 and County Road (CR) 710, Center Hill, Florida (the Site).[8] This wetland was originally the northern part of a much larger wetland system but, years before, had been severed from the larger system by the construction of the two roads which form a "V" at the southern boundary of Petitioner's property.

6. Due to its severance from the larger system, the condition of the wetland on the Site was adversely affected. In addition, the Site had been used by others for dumping various types of debris over the years, including tires, appliances, and concrete.

7. In approximately 2007, Petitioner decided to clean up the Site and build a pond. Although the primary water needs for his cattle had been met with water troughs serviced by a four-inch well on the Property, he intended to use the pond as a supplemental source of water supply for his cattle.

8. In deciding to build the pond, Petitioner did not consult with SWFWMD. Nor did he confer with an engineer regarding the amount of water the pond should hold to meet the needs of his cattle. Rather, his decision as to the size and configuration of the pond was driven by the footprint of the area in the Site that Petitioner perceived as "full of garbage" and a "landfill."

9. Finding of Fact 9 is partially rejected but accepted in part, as modified: In March 2007, Petitioner began cleaning up the Site. During cleanup, 26 old tires, 14-cubic yards of old appliances, and pieces of concrete and steel were removed from the Site.

10. While there were no accurate wetland surveys of the Site prior to the initiation of Petitioner's clean-up efforts, historical photographs of the Site and remnant plants indicate that,

[8] The wetland was located on the Ramaela property, but for purposes of the exemption determination at issue, has been treated as part of the entire 118 acres of Property.

at the time Petitioner undertook the cleanup, the wetland had been significantly impacted. The construction of roads SR 469 and CR 710, which occurred prior to 1973, severed and excluded the Site from the larger wetland area, preventing the free flow of water beyond the Site. Although remaining a wetland, the severance adversely impacted the wetland even before the dumping.

11. The likely dominant species in the wetland were Carolina Willow (Salix spp.) and Primrose Willow (Ludwigia spp.). While both Carolina Willow and Primrose Willow are obligate wetland indicator species,[9] Primrose willow can be a nuisance species and Carolina willow can form a monoculture.

12. In June 2007, SWFWMD became aware of Petitioner's activities on the Site. SWFWMD opened a complaint file and advised Petitioner that he should not proceed without a permit.

13. Petitioner met with District staff on a number of occasions during his activities in an attempt to find a resolution with SWFWMD, but a resolution was never reached.

14. As a result of Petitioner's dredging and filling, a 1.12-acre pond was created and an area of approximately 1.3 acres of wetland was filled. There is no remaining wetland function at the Site.

15. In July 2008, the City of Center Hill sent a letter to SWFWMD's Environmental Regulation Manager. The letter, dated July 2, 2008, was signed by the City of Center Hill's Mayor, Chairman of the City Council, and City Clerk, and stated in pertinent part:

> As community leaders we have many responsibilities that include the stabilization and revitalization of the City of Center Hill. We are fortunate to have citizens who are concerned and active regarding the quality of life in the neighborhoods they reside in. The upkeep of our neighborhoods remains a critical element to the success of our community.

[9] See Fla. Admin. Code R. 62-340.450(1).

> Code enforcement cannot be successful without the support of our local citizens. It is the responsibility of each of us to keep our properties code compliant. This will ensure a safe and healthy City.
>
> As part of a large voluntary effort, we are pleased that Serenity Ridge Farms in eastern Center Hill implemented a clean-up on property adjacent to the intersection of SR 469 and CR 710 (E. Jefferson Street). The community has increased traffic visibility at this location after the removal of nuisance overgrowth. Additionally, the hauling of debris from the site eliminated a public health hazard that existed as a common dumping-ground for many years. In fact, the work at this location far exceeds any code compliance among the nearly 60 cases that have come to our attention in recent years.
>
> Property owners like Serenity Farms are what make our City in Sumter County a great place to live. Hence we ask that our correspondence be included in your files and distributed to members of your staff as you see fit. The subject property has no code deficiencies in the City of Center Hill.

16. Despite the City's letter and efforts between Petitioner and SWFWMD, negotiations to settle SWFWMD's complaint by restoration or mitigation of the alleged adverse impacts of Petitioner's dredge-and-fill activities have been unsuccessful.

17. SWFWMD's governing board authorized initiation of litigation against Petitioner on December 14, 2010.

18. On January 4, 2011, Petitioner submitted an after-the-fact application to SWFWMD for an environmental resource permit for the pond, along with an approximately $1,500 permit application fee. After conducting a site meeting to review the impact of Petitioner's activities, District staff made a request for additional information. The request for additional information (RAI) requested an amount of engineering that, according to Petitioner, would make compliance cost prohibitive. As Petitioner explained in his testimony:

> My quick estimate, and what the engineering, required all of that, surveys[,] to[p]ographic surveys, could have been anywhere from 50 to [$]75,000, maybe more.

While the actual costs to comply with SWFWMD's RAI have not been determined, Petitioner's testimony that the RAI requirements were cost prohibitive is credited, subject to the consideration that section 373.406(2), Florida Statutes makes no mention of cost as a factor in whether an exemption from permitting is appropriate.

19. On November 14, 2011, SWFWMD wrote a letter to FDACS formally requesting a binding determination from FDACS as to whether the activities on the Property qualify for the agricultural exemption afforded by section 373.406(2), Florida Statutes.

20. After receiving SWFWMD's request, Department staff conducted a site visit of the Property on December 28, 2011.

21. Finding of Fact 21 is accepted as modified: The approximately 1.12-acre open water area resulting from Petitioner's dredging and filling ranges from 4 to 6 feet deep at the center, depending on the groundwater level. At the time of the FDACS's site visit, the central pond depth was approximately four feet. December is the dry season in this area of Florida and in 2011 there was a drought. Petitioner's survey of the Site shows a water depth of six feet.

22. There has been some recruitment of wetland vegetation in the shallower areas of the pond. In fact, some of the emergent vegetation is of higher quality than that which existed prior to the dredging and filling, and there is evidence that wildlife is utilizing it.

23. In addition, Petitioner's activities included the construction of berms below the bisecting roadways that help filter direct road run-off that previously washed into the Site.

24. The Site, however, has not been restored to a wetland in any significant way. No regeneration is expected at sustained depths of greater than two feet. The maximum recommended depth for planting is one-and-one-half feet.

25. The pond is fenced off, preventing the cattle from direct pond access.

26. Petitioner has spent over $12,000 landscaping and putting in an irrigation system around the pond area. The irrigation system is designed to water the landscaping, including sapling live oaks and sod. Neither landscaping a pond nor irrigating landscaping around a pond is typical for cattle ponds. Petitioner has stated that he would someday like to build a retirement home overlooking the pond.

27. The irrigation system, like the watering troughs on the upland portions of the Property, is serviced by a four-inch diameter well.

28. Generally, a four-inch well can produce 60-100 gallons per minute. The pond as constructed contains approximately 100,000 gallons in the first four inches of water alone.

29. SWFWMD's standard permitting allocation for water withdrawal for cattle is 12 gallons of water per day. Under FDACS's best management practices rule,[10] the allocation is up to 30 gallons per head of cattle per day.

30. On February 10, 2012, FDACS rendered its Preliminary Determination which concluded that Petitioner's activities did not meet the requirements for an agricultural exemption. Under the heading "Application of Statutory Criteria," the Preliminary Determination stated:

> Pursuant to Section 373.406(2) F.S., all of the following criteria must be met in order for the permitting exemption to apply.
>
> (a) "Is the landowner engaged in the occupation of agriculture, silviculture, floriculture, or horticulture?"
>
> YES. The [FDACS's Office of Agricultural Water Policy] finds that [Petitioner] is engaged in the practice of agriculture on 118 acres of agricultural land in Sumter County, as evidenced by their current agricultural land use classification, the ongoing agricultural production activities observed on site, and the aforementioned cattle sale receipts.

[10] See Fla. Admin. Code R. 5M-11.

(b) "Are the alterations (or proposed alterations) to the topography of the land for purposes consistent with the normal and customary practice of such occupation in the area?"

NO. [FDACS] finds that the construction of a cattle watering pond within the footprint of a wetland is not a normal and customary practice for the area because:

1. Cattle watering ponds are not normally constructed within wetlands; and

2. Cattle watering troughs were observed in other upland locations throughout the property, precluding the need for a cattle pond in this location.

(c) "Are the alterations (or proposed alterations) for the sole or predominant purpose of impeding or diverting the flow of surface waters or adversely impacting wetlands?"

NO. (As to impeding or diverting surface waters.) [FDACS] finds that the construction of a pond in the wetland was not for the sole or predominant purpose of impeding or diverting surface waters. During the December 28, 2011 site visit, [FDACS's Office of Agricultural Water Policy] staff verified that the post-development drainage patterns are consistent with the pre-development drainage patterns. Secondly, the wetland is not connected to offsite drainage systems, as it was severed in its entirety by the construction of SR 469 and CR 710. This occurred prior to [Petitioner] taking ownership of the property. Lastly, the entire farm's drainage system is gravity driven, and is devoid of discharge pumps.

YES. (As to adversely impacting wetlands.) [FDACS] is aware that the wetland was already of questionable quality (see letter from the City of Center Hill) when the pond was constructed, given that the wetland was severed and excluded from the larger wetland system by the construction of SR 469 and CR 710. Nevertheless, [FDACS] finds that the activity was for the sole or predominant purpose of adversely impacting the wetland, as the character of the wetland was destroyed.

31. In sum, the Preliminary Determination concluded that Petitioner's dredging and filling activities did not qualify for the agricultural exemption provided under section

373.406(2) because the activities are not normal and customary and they adversely impacted wetlands.

32. At the final hearing, however, the evidence indicated that Petitioner's activities were normal and customary for cattle operations in the area. Finding of Fact 32 is accepted with limitations. Excavation of cattle watering ponds in the area and cleanup of debris are normal and customary in the area. However, the scope of the excavation and cleanup require a Conclusion of Law.

33. While the water needs of Petitioner's cattle are usually served by a four-inch well, the pond constructed at the Site has been an effective supplemental source of water for Petitioner's cattle operations. When the well ran dry, Petitioner used pump trucks to siphon water from the pond and fill the upland troughs. Petitioner plans to put a pump in the pond to supply water to his cattle, but has not yet done so.

34. Man-made, belowground cattle-watering ponds are very typical in Florida, especially in South and Southwest Florida because of the high water tables in the southern part of the peninsula.[11] However, low lying areas do not equate to wetlands.

35. Further, "[i]t is not uncommon practice for Florida cattle ranchers to excavate cattle ponds, remove muck from existing cattle ponds, and/or grade side slopes of ponds in low lying depressional areas to provide a safe and reliable water source for their cattle."[12] However, low lying areas do not equate to wetlands.

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[11] This finding is extracted from the testimony of FDACS's Environmental Administrator William Bartnick, who added, "but the [cattle ponds] I've seen are almost always constructed in uplands and our manual says 50 feet away from the well and edge [of wetlands]." See TR 8-8, p. 132. While Mr. Bartnick's testimony reflected in the finding is credited, his observations regarding the locations of ponds were contradicted by more persuasive evidence indicating that cattle ponds are commonly located in low-lying areas.

[12] See Exhibit P-1A (Department's Non-Binding Written Summary and Opinion on Louis M. Sanchez, dated April 25, 2003, p. 2).

36. The fact that it is common for cattle ponds to be built in low-lying areas was further demonstrated by aerial photographs presented by Petitioner's witness, Mr. Modica, of areas near the Property, including an approximately six-acre pond off Palm Avenue (the Sanchez property), a pond at a site labeled Emory Lane, and a pond off CR 48. While the ponds are considered by SWFWMD to be out of compliance on the grounds that they may have adversely affected wetlands, their existence shows that dredging and filling in low areas for cattle ponds is common practice in the area.[13]

37. Finding of Fact 37 is accepted as modified: The pond is larger than needed because the footprint of the dumping area was large, and Petitioner may have some non-agricultural plans for the Site in the future.

38. On the issue of whether there was adverse impact to a wetland, the evidence showed that Department changed its position several times while drafting the Preliminary Determination.

39. Of the five drafts of the Preliminary Determination, on the question (c) "[a]re the alterations (or proposed alterations) for the sole or predominant purpose of . . . adversely impacting wetlands?" one draft stated:

> UNSURE. (As to adversely impacting wetlands.) Documentation shows a 2.47 acre wetland impact area. This dredge and fill activity was for the purpose of converting the wetland to an open water and pasture area. However, this remnant wetland area was severed and excluded from the larger wetland system, as it was originally impacted by the construction of SR 469 and CR 710. Although wetland conditions prior to Zagame's actions cannot be determined with certainty, a letter from the City of Center Hill indicates questionable wetland condition, which obfuscates remaining quality and function.

[13] Mr. Modica also testified that he had four ponds that had been dug in wetlands on his own property in the area and that there were a number of ponds dug in wetlands on the Disney Wilderness Preserve (previously, the Walker Ranch property) that the Nature Conservancy which manages the property had matured into stable systems that they decided not to restore. While details as to the date of construction of these ponds was not provided, Mr. Modica's testimony provided additional support for the proposition that dredging of cattle ponds in wetlands has been a common practice for the area in the past.

40. Another draft, in answering the same question, stated:

> NO. (As to adversely impacting wetlands.) In the opinion of the [FDACS], the impacted remnant wetland was of questionable quality (see letter from the City of Center Hill) having been previously severed and excluded from the larger wetland system, by the construction of SR 469 and CR 710.

41. Finding of Fact 41 is rejected as a Conclusion of Law.

IX. CONCLUSIONS OF LAW

The Commissioner accepts the Conclusions of Law set forth in the ALJ's Recommended Order, recounted below, except as modified or rejected.

42. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding, pursuant to sections 120.569, 120.57(1), and 373.406(2), Florida Statutes.

43. This review of Petitioner's qualification for an exemption is de novo, as FDACS's Preliminary Determination is proposed agency action. The request for a hearing effectively rendered the agency action non-final and triggered the de novo hearing. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

44. In this case, Petitioner is asserting that his activities qualify for the exemption from Environmental Resource Permitting pursuant to section 373.406(2), Florida Statutes. Exceptions to the regulatory authority conferred by chapters 373 or 403 are to be narrowly construed against the person who is claiming the statutory exemption. Samara Dev. Corp. v. Marlow, 556 So. 2d 1097, 1100 (Fla. 1990).

45. As the party claiming that he qualifies for the exemption, Petitioner carries the "ultimate burden of persuasion" with regard to such qualification. J.W.C. Co., 396 So. 2d at 787.

46. Petitioner must show by a preponderance of the evidence that his activities are exempt from regulation. See section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

47. The basic permitting authority of the water management districts is set forth in section 373.413, Florida Statutes, which provides:

> Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of SWFWMD.

(emphasis added).

48. Impoundment is defined in section 373.403(3) as: "any lake, reservoir, pond or other containment of surface water occupying a bed or depression in the earth's surface and having a discernible shoreline." The pond constructed by Petitioner is therefore an impoundment and, unless exempt, is subject to the requirement of obtaining an environmental resource permit.

49. Section 373.406(2) provides an exemption from Environmental Resource Permitting for certain agricultural activities.

50. Prior to 2011, section 373.406(2), provided:

> Nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land for purposes consistent with the practice of such occupation. However, such alteration may not be for the sole or predominant purpose of impounding or obstructing surface waters.

51. In 2011, section 373.406(2) was revised by chapter 2011-165, Laws of Florida, shown with the new language underlined and old language stricken, as follows:

> Notwithstanding s. 403.927, nothing herein, or in any rule, regulation, or order adopted pursuant hereto, shall be construed to affect the right of any person engaged in the occupation of agriculture, silviculture, floriculture, or horticulture to alter the topography of any tract of land, including, but not limited to, activities that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes consistent with the normal and customary practice of such occupation in the area. However, such alteration or activity may not be for the sole or predominant purpose of impeding ~~impounding~~ or diverting the flow of ~~obstructing~~ surface waters or adversely impacting wetlands. This exemption applies to lands classified as agricultural pursuant to s. 193.461 and to activities requiring an environmental resource permit pursuant to this part. This exemption does not apply to any activities previously authorized by an environmental resource permit or a management and storage of surface water permit issued pursuant to this part or a dredge and fill permit issued pursuant to chapter 403. This exemption has retroactive application to July 1, 1984.

52. Section 373.406(2) has not changed since the 2011 revisions. By its terms, the exemption provided in section 373.406(2) has retroactive application. Furthermore, as Petitioner is, in essence, an applicant for the exemption, current law should apply. See Lavernia v. Dep't of Prof'l Reg., Bd. of Med., 616 So. 2d 53 (Fla. 1st DCA 1993) (law for determining applications is the statute in effect at the time of final determination).

53. For many years prior to 2011, FDACS had the authority to review and give non-binding opinions at the request of a water management district concerning whether claimed alterations qualified for an agricultural exemption under section 373.406(2). However, along with other revisions in 2011, chapter 2011-165, Laws of Florida, authorized FDACS to make binding determinations, at the request of a water management district or a landowner, regarding whether alterations or activities qualify for an exemption. See section 373.407, Florida Statutes.

54. Two threshold issues for an exemption under section 373.406(2) are: (1) is the land classified as agricultural pursuant to section 193.461, Florida Statutes, and (2) is the person whose activities are in question engaged in agriculture. The parties stipulated that both of these threshold requirements were met in this case.

55. The other two criteria, which are the ones at issue in this case, are whether the activity (1) is for purposes consistent with normal and customary agricultural practices for the area and (2) is not for the sole or predominant purpose of adversely impacting wetlands.

56. The ALJ's Conclusion of Law is as follows: "As noted in the Findings of Fact, above, as a matter of fact, it has been found that Petitioner's activities were normal and customary and were not for the sole or predominant purpose of adversely impacting wetlands. The factual findings are consistent with applicable law." This Conclusion of Law 56 is rejected in part. A portion of the Petitioner's activities were, as a Finding of Fact, normal and customary while the remainder of those activities are not normal and customary as a Conclusion of Law. Further, a portion of the Petitioner's activities were not for the sole or predominant purpose of adversely impacting wetlands while the remainder of those activities were for the predominant purpose of impacting wetlands.

57. Under the facts and circumstances of this case, it is appropriate to analyze the impact to the wetlands criteria first. The 2011 revisions to section 373.406(2), Florida Statutes, specifically exempt from regulation those agricultural alterations or activities "that may impede or divert the flow of surface waters or adversely impact wetlands, for purposes consistent with the normal and customary practice of such occupation in the area . . . [as long as] such alteration[s] or activit[ies]

[are] . . . not . . . for the sole or predominant purpose of impeding impounding or diverting the flow of obstructing surface waters[14]or adversely impacting wetlands."

58. The words "predominant" and "purpose," as used in section 373.406(2), Florida Statutes (2007) prior to the 2011 revisions were construed in Duda and Sons, Inc. v. St. Johns River Water Mgmt. Dist., 17 So. 3d 738 (Fla. 5th DCA 2009). As the context of those terms as used in the current version of section 373.406(2), Florida Statutes is the same, the interpretation of those terms in Duda and Sons, Inc., supra (Duda I), is still relevant. There, the Fifth District Court of Appeal agreed with the water management district and administrative law judge's interpretation of the term "purpose" within the context of section 373.406(2), Florida Statutes to mean the action's objective effect or function, as opposed to the subjective intent of the landowner in undertaking the action. Duda I, 17 So. 3d at 742. The Fifth District Court of Appeal, however, rejected the water management's definition of the term "predominant" as "more than incidental," and explained:

> "Predominant" does not mean "more than incidental." There are many gradations between "predominant" and "incidental." An item can be "more than incidental" but not "predominant. For example, if an individual had four equal sources of income totaling $100,000/year, all four sources of income would be "more than incidental." However, none of the four would be a predominant source of income. Similarly, an alteration of topography may have more than an incidental effect of impounding or obstructing surface waters even though that was not the predominant effect. The lack of merit in the District's argument is further demonstrated by the fact that pursuant to section 373.406(6), the District has already exempted from regulation any activity which has "only minimal or insignificant individual or cumulative adverse effects on the water resources of the district" for both agricultural and non-agricultural activities. [footnote omitted] The District's interpretation of

[14] Impeding or diverting surface waters is not at issue. In its Preliminary Determination, FDACS found that the construction of a pond in the wetland was not for the sole or predominant purpose of impeding or diverting surface waters. The evidence in this case supports that conclusion, as well as FDACS's finding in its Preliminary Determination that "the post-development drainage patterns are consistent with the pre-development drainage patterns . . . [and that] the wetland [was] not connected to offsite drainage systems, as it was severed in its entirety by the construction of SR 469 and CR 710, . . . prior to [Petitioner] taking ownership of the property."

> section 373.406(2), if accepted, would render the agricultural exemption virtually meaningless. As conceded by the District at oral argument, an alteration of topography that had the effect of only incidentally impounding or obstructing surface waters would, in almost all cases, already be exempt from regulation pursuant to subsection (6) -- regardless of whether the property owner was engaged in the occupation of agriculture.[15]
>
> * * *
>
> In its brief, Duda contends that the primary purpose of its drainage ditches was to lower the level of the groundwater table so as to enhance agricultural productivity. Section 373.406(2) provides an exception to the agricultural exemption for the impounding or obstructing of surface waters -- not ground water. [footnote omitted] Accordingly, if Duda constructed a drainage ditch for a purpose consistent with the practice of agriculture and if the predominant effect of the drainage ditch was to lower the groundwater table level, then the construction of the drainage ditch would be exempt from the District's permitting requirements even if the ditch had a more than incidental effect of impounding or obstructing surface waters.

Duda I, 17 So. 3d at 743-744. Cf. Fla. Admin. Code R. 5M-15.001(3)(effective 10/14/2012, subsequent to Duda I and one day prior to the last day of the final hearing)("Sole or predominant purpose [means] [t]he primary function of the activity in question").

59. The ALJ's Conclusion of Law is as follows: "Similarly, in this case, while there was more than an incidental impact on a wetland, the evidence showed that Petitioner's activities were not for the sole or predominant purpose of adversely impacting a wetland, but rather were primarily undertaken to construct a cattle pond and clean up a dumping ground." This Conclusion of Law is accepted in part but limited to those portions of Petitioner's activities that are normal and customary, as a Finding of Fact, i.e. excavation of a pond reasonably sized to water the Petitioner's herd of cattle and excavation of the wetland only to the extent necessary to

[15] The exemption for minimal or insignificant impacts on water resources referenced by the Fifth District was unchanged by the 2011 revisions and is still found in the present version of section 373.406(6), Florida Statutes.

clean up the debris. The placement of unnecessary fill in the wetland had a predominant purpose to adversely impact the wetland.

60. This conclusion is made with due regard for the elevated legal status and protection that Florida's wetlands have deservedly received under state and federal laws enacted in the 1980's and 90's.[16]

61. In recognition of these wetland protections, in a subsequent appeal involving a substantive enforcement action against A. Duda and Sons, Inc., in A. Duda and Sons, Inc. v. St. Johns River Water Management District, 22 So. 3d 622, 623 (Fla. 5th DCA 2009)(Duda II),[17] the Fifth District Court of Appeal observed:

> . . . Duda I did not address the interplay between section 373.406(2) and language from the Warren S. Henderson Wetlands Protection Act, chapter 84-79, Laws of Florida, now codified at sections 403.927 (2) & (4)(a), Florida Statutes. Those provisions virtually eliminate the agricultural exemption as it applies to alterations impacting wetlands. Under section 403.927, agricultural activities that impede or divert the flow of surface waters even incidentally are not exempt from regulation if they impact wetlands. Id.

62. The 2011 revisions to the agricultural exemption found in 373.406(2), however, were made after the Fifth District's observations in Duda II. Contrary to Duda II's suggestion that an agricultural exemption is unavailable for alterations that impact wetlands, the initial sentence of

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[16] As accurately noted in FDACS's Proposed Recommended Order, in 1984, Florida adopted the Henderson Wetland Protection Act, which expanded the scope of wetland regulation in the state to include agricultural wetlands connected to state waters. Ch. 84-79, Laws of Fla. Congress passed the Food Security Act of 1985, Pub. L. No., 99-198 (codified at 16 U.S.C §§3801-3862), section 3821 of which required that farmers receiving USDA benefits to refrain from cultivating wetlands. In 1986, the Florida legislature adopted section 373.414(1), Florida Statutes, which directed water management districts to adopt rules relating to the regulation of isolated wetlands. Ch. 86-186, § 4, Laws of Fla. And in 1993, the Florida legislature transferred and amended dredging and filling criteria from chapter 403 to chapter 373, Florida Statutes, which accomplished a substantial reorganization of wetland regulation in Florida, and placed all wetlands, including isolated wetlands, under the dredge and fill regulatory authority of FDACS of Environmental Protection and water management districts. See Ch. 93-213, Laws of Fla.

[17] Duda I, supra, involved a final order entered by an administrative law judge (ALJ) denying the appellant's challenges to certain adopted rules, statutory interpretations, and policies. Duda II was an appeal from a final order from the water management district adopting the ALJ's recommended order which required appellant to either restore impacted wetlands or apply for after-the-fact permits.

the 2011 revisions begins "Notwithstanding s. 403.927," and then specifically includes "activities that may . . . adversely impact wetlands" within the activities contemplated for exemption from regulation. See section 373.406(2), Fla. Stat. (first sentence).

63. Conclusion of Law 63 is accepted as modified: Despite vast and important legislation protecting wetlands, an exemption is contemplated for qualifying activities that do not have a predominant purpose of adversely affecting wetlands.

64. Conclusion of Law 64 is accepted as modified and limited to the Petitioner's activities that are normal and customary as a Finding of Fact and as a Conclusion of Law. Petitioner should be entitled to a partial exemption.

65. Conclusion of Law 65 is rejected for the reasons stated previously in this Final Order.

66. Conclusion of Law 66 is rejected for the reasons stated previously in this Final Order.

67. Conclusion of Law 67 is rejected for the reasons stated previously in this Final Order.

68. Conclusion of Law 68 is rejected for the reasons stated previously in this Final Order.

69. Conclusion of Law 69 is accepted as modified: As part of the revisions made in chapter 2011-165, Laws of Florida, the definition of "agricultural activities" found in section 403.927(4)(a) was also revised, shown with new language underlined and old language stricken, as follows:

> *"Agricultural activities" includes all necessary farming and forestry operations which are normal and customary for the area, such as site preparation, clearing, fencing, contouring to prevent soil erosion, soil preparation, plowing, planting cultivating, harvesting, fallowing, leveling, construction of access roads, ~~and~~ placement of bridges and culverts, and implementation of best management practices adopted by [FDACS] of Agriculture and Consumer Services or practice standards adopted by the United States Department of Agriculture's Natural Resources Conservation Service, provided such operations are not for the sole or predominant purpose of impeding ~~do not impede~~ or diverting ~~divert~~ the flow of surface water or adversely impacting wetlands.*

70. Conclusion of Law 70 is accepted as modified: Rather than restricting which practices are "normal and customary," the conjunctive "and" actually expands the list of "agricultural activities" previously set forth in section 403.927(4)(a), Florida Statutes, to also include best management practices. [18]

71. While not all aspects of Petitioner's pond are typical, the evidence demonstrated that Petitioner's activities resulted in a cattle pond that was useful to his cattle operations and were partially for "purposes consistent with the normal and customary practice of such occupation in the area" within the meaning of section 373.406(2), Florida Statutes.

CONCLUSION

The Commissioner having reviewed the Findings of Fact, Conclusions of Law, transcript of the proceedings, exhibits entered into evidence, argument of the Parties, and the exceptions filed by FDACS and SWFWMD makes the following additional Conclusions of Law.

72. A portion of Petitioner's activities are exempt as provided by section 373.406(2), Florida Statutes. The exemption is strictly limited to those portions of the Petitioner's activities that are normal and customary in the area and do not have the predominant purpose of adversely impacting the wetland.

73. The excavation of a cattle watering pond larger than is reasonably necessary to serve the needs of a rancher's herd of cattle is uncommon and leads to a Conclusion of Law that oversized cattle watering ponds are not normal and customary. In this case the Petitioner excavated a pond in a wetland that is much larger than necessary. As previously noted, cattle utilize between 12 and 30 gallons per head per day. Adequate evidence exists to conclude that a pond of one tenth of one acre is adequate to water 100 head of cattle. Petitioner's pond is approximately 1.12-acres.

[18] This conclusion is consistent with FDACS's new rule that defines "normal and customary practice in the area" as "[g]enerally accepted agricultural activities" without reference to best management practices. See Fla. Admin. Code R. 5M-15001(2).

Due to the size of Petitioner's herd (a maximum of 65 head) a pond of 1.12-acres is grossly out of proportion and therefore cannot be considered normal and customary.

74. It is abundantly clear that Petitioner was also cleaning up what has been described as a "garbage dump." The City of Center Hill commended the Petitioner for eliminating what was characterized as a "public health hazard." However, Petitioner's effort to eliminate this condition on his land led to the destruction of the entire isolated 2.5-acre wetland. The relatively small amount of debris (14 cubic yards of debris and 26 old tires) removed from the wetland by the Petitioner cannot account for the overall scope of the excavation and fill. Removing garbage from a wetland in a reasonably unobtrusive manner is normal and customary as a Conclusion of Law. However, Petitioner's activities go far and above what could be considered normal and customary, especially when considering the amount of fill placed on the remaining wetland (1.3-acres). A portion of Petitioner's activities can be considered normal and customary, i.e. limited excavation of garbage, as a Conclusion of Law. The remaining portion cannot be considered normal and customary as a Conclusion of Law.

75. The record is wholly devoid of any evidence supporting the notion that the placement of 1.3-acres of fill on a wetland is normal and customary. Petitioner's activities associated with excavating the pond and excavating the garbage from the wetland do not involve the placement of the fill. It is the placement of the fill that causes the largest adverse impact to this 2.5-acre wetland. The fill placed on 1.3-acres of the wetland is not normal and customary as a Conclusion of Law.

76. Even if the placement of fill was somehow found to be normal and customary under section 373.406(2), Florida Statutes, the predominant purpose of filling the remainder of the wetland can only be to destroy the wetland. The fill cannot be considered a legitimate

agricultural activity. The area was filled and landscaped and the subjective intent of the Petitioner is to build a home adjacent to the pond. These activities and subjective intent belie the stated agricultural purposes. A "Specific Purpose Survey" was included with FDACS exhibit 1. The Specific Purpose Survey clearly shows elevations within the wetland area well above the water level of the pond and most certainly above the previous elevation of the wetland. This conclusion is supported by the testimony of Mr. Wheaton that SWFWMD dug down approximately three feet in an effort to determine the depth of the fill on top of the wetland. (TR 8-8, p. 172-173) It is clear that the primary effect of the placement of the fill in the wetland was the complete destruction of that portion of the wetland. Based on the applicable law, the predominant purpose of these activities was to adversely impact the wetland under section 373.406(2), Florida Statutes. See Duda I, 17 So. 3d 738 (Fla. 5th DCA 2009).

77. A discreet portion of Petitioner's activities previously found to be normal and customary as a Finding of Fact and Conclusion of Law, i.e. a reasonably sized cattle watering pond and reasonably unobtrusive removal of garbage from a wetland are entitled to the exemption in keeping with section 373.406(2), Florida Statutes.

78. The Findings of Fact support the notion that the pond itself was sized according to the footprint of the dumping area, specifically Finding of Fact 8. The excavation of a reasonably sized cattle watering pond (one tenth acre per hundred head); the reasonably unobtrusive removal of garbage from a wetland; and the destruction of a wetland in those specific areas form the objective purposes of those activities in keeping with Duda I, 17 So.3d 738 (Fla. 5th DCA 2009).

79. That portion of the cattle watering pond that is oversized and the overly intrusive removal of the garbage, resulting in fill placed on the remainder of the wetland, are not normal and

customary as a Conclusion of Law. Because these effects do not serve any reasonable agricultural purpose, the objective predominant purpose is to adversely impact the wetland as a Conclusion of Law.

80. The cattle watering pond was excavated without the benefit of engineering and survey work that likely would have resulted from the permitting process. A tenth of an acre pond is reasonable given the number of head in Petitioner's herd. Additionally, Finding of Fact 8 clearly indicates that the "size and configuration of the pond was driven by the footprint of the area . . . perceived as 'full of garbage' and a 'landfill.'"[19] The effects of these discreet activities resulted in the excavation of a pond, the removal of garbage from a wetland, and the destruction of the wetland where the pond now lies. None of these three effects seems greater than the other two combined. The result is that adversely impacting the wetland was not the objective predominant purpose of the Petitioner's excavation of the 1.12-acre pond as a Conclusion of Law.

ORDERED AND ADJUDGED:

The Petitioner is entitled to an exemption limited to the 1.12-acre pond.

The Petitioner is not entitled to an exemption for the 1.3-acres of fill placed on the wetland.

[19] Neither FDACS nor SWFWMD filed an exception to this Finding of Fact.

NOTICE OF RIGHT TO APPEAL

Any party to these proceedings adversely affected by this Final Order is entitled to seek review of this order pursuant to Section 120.68, Florida Statutes, and Rule 9.110, Florida Rules of Appellate Procedure. Review of proceedings must be initiated by filing a petition for review or notice of appeal with the Agency Clerk of the Florida Department of Agriculture and Consumer Services, 407 South Calhoun Street, Mayo Building, Room 509, Tallahassee, Florida 32399-0800. A copy of the petition for review or notice of appeal, accompanied by the filing fees prescribed by law must also be filed with the appropriate District Court of Appeal within thirty (30) days of the date this Order was filed with the Agency Clerk.

DONE AND ORDERED this 2nd day of May, 2013.

ADAM H. PUTNAM
COMMISSIONER OF AGRICULTURE

Michael A. Joyner
Assistant Commissioner

Filed with Agency Clerk this 2nd day of May, 2013.

Agency Clerk

Copies to: Petitioner, Joseph E. Zagame
Respondent, Lorena Holley, General Counsel
Respondent, Carol Forthman, Senior Attorney
Intervenor, Amy Wells Brennan, Senior Attorney

ADAM H. PUTNAM
COMMISSIONER

Florida Department of Agriculture and Consumer Services
Office of General Counsel

INDEXING AND LISTING ADMINISTRATIVE FINAL ORDERS

I. CASE INFORMATION

File Name: Zagame v. FDACS

Division: WP Bureau:

Agency Clerk No.: A77568 ~~121356~~ Docket No.: 2013-0028 Attorney: Williams

All Administrative Final Orders, including, "Settlement Agreements" are to be listed.

II. CRITERIA FOR INDEXING: Certain Administrative Final Orders are required to be "Indexed" as a matter of law. In determining if this file needs to be indexed, please use the following criteria, and circle those that are applicable:

a. Discusses a substantial legal issue of first impression which is actually resolved in the case.

b. Establishes a rule of law, principle, or policy for the first time upon which the Department will rely and apply in similar circumstances.

c. Alters, modifies, or significantly clarifies a rule of law, principle, or policy previously applied, announced, or relied upon by the Department.

d. Resolves an apparent conflict in decisions of the Department or harmonizes decisions of appellate courts.

III. INDEXING REQUIRED: ☒ Yes ☐ No If yes, please Index below:

IV. INDEXING SUBJECTS: Using the **FLORIDA STATUTES GENERAL INDEX** as a non-exclusive guide, please indicate **ALL** subjects (up to three levels) under which the case should be indexed:

1. Water Resources, Agricultural Exemption, Binding Determination, sections 373.406, 373.407, Florida Statutes

2. Department of Agriculture and Consumer Services, Agricultural Exemption, Binding Determination, sections 373.406, 373.407, Florida Statutes

3. Water Management Districts, Agricultural Exemption, Binding Determination, sections 373.406, 373.407, Florida Statutes

4.

V. Check the appropriate type of "Final Order":

☐ Declaratory Statement **[DS]** ☐ Existing Rule Challenge **[RC]** ☐ Proposed Rule Challenge **[PC]**

☒ Final Order Formal **[FF]** ☐ **Final Order Informal [FI]** ☐ Settlement Agreement **[SA]**
☐ Final Order – Default **[FD]**

Attorney's Initials: RW **Date:** 5/8/13 Note: Transmit completed form with proposed/reviewed Final Orders.